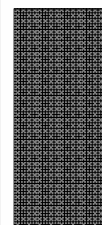


ARIZONA'S PUBLIC RECORDS STATUTES AND PRACTICES

SESSION 2 OF 6 ON RECORDS MANAGEMENT



PRESENTER(S)

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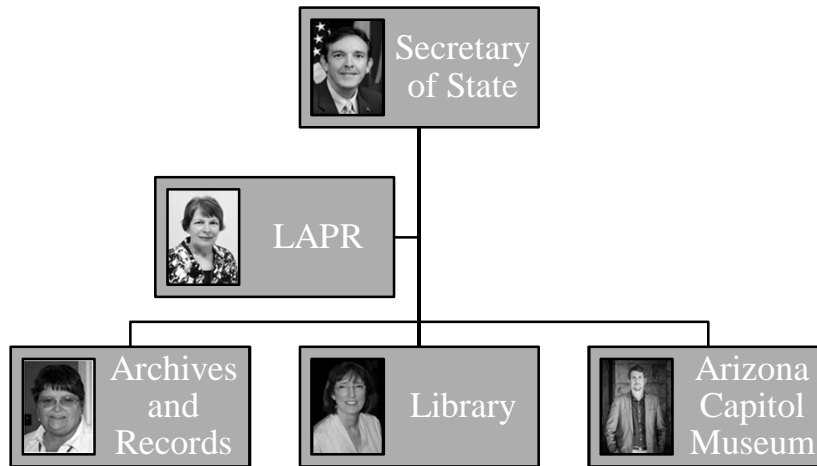
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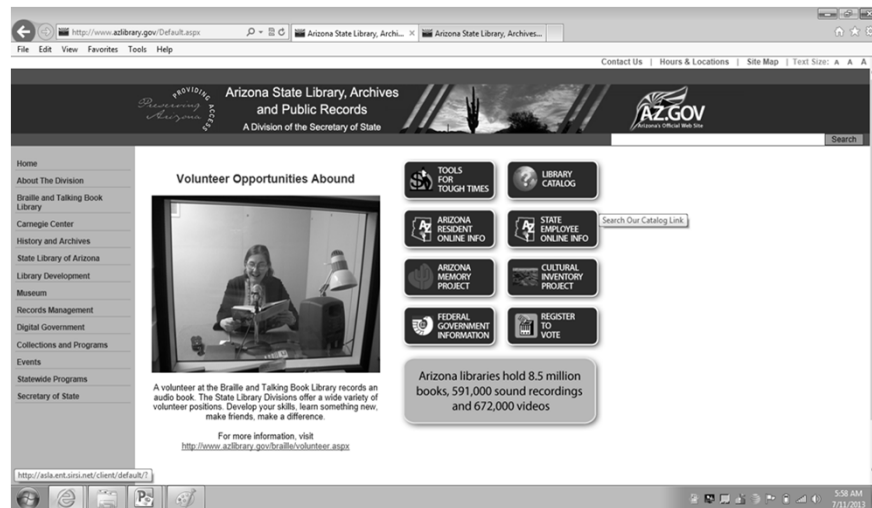
State Archivist

State History and Archives
Arizona State Library, Archives and Public Records
Arizona Secretary of State

LIBRARY, ARCHIVES AND PUBLIC RECORDS (LAPR) ORGANIZATION AS A STATE AGENCY



LAPR WEBSITE



RECORDS MANAGEMENT CENTER WEBSITE



GENERAL GUIDANCE FOR ON-LINE SESSIONS

1. Please remember that while you are in the on-line classroom, all other participants **can hear everything** you say (even in the background), and **can see everything** you write on the whiteboard.
2. I will be muting All participants to help with sound distortion.
3. Please make sure that all phones are muted during the sessions. **Press *6 and your phone will be muted.**
4. Feel free to submit notes during session for discussion. If you would like to **send a note / comment**, please **send to "all"** so that everyone can see the question and then hear the answer to that question.
5. Please raise your hand if you wish to speak
6. Take a vote: How many of you are participating in today's session with a group of co-workers?
7. If so, how many of you are there in your group? (Send # as a note)
8. At the end of the training, I will be taking questions. Write down any questions you have during the session, and we will have an opportunity to ask them at the end.

ALL RECORDS MANAGEMENT IN ARIZONA IS GOVERNED BY ARIZONA REVISED STATUTES (ARS)

- In Arizona, **everything that we do** in Records Management and Public Records Requests is governed by Arizona Revised Statutes (ARS).
- The ARS that govern Public Records Requests are:
§39-101 – §39-128
- The purpose of this training today is to **examine the Public Records Statutes in detail** and to **learn what is required of public bodies** in the area of Public Records.

WHAT IS A "RECORD"

41-151.18. Definition of records

In this article, unless the context otherwise requires:

- **"records"** means all books, papers, maps, photographs or other documentary materials,
- **Regardless of physical form or characteristics**, including prints or copies of such items produced or reproduced on film or electronic media pursuant to section 41-151.16,
- **Made or received by any governmental agency** in pursuance of law or in connection with the transaction of public business and preserved or appropriate for preservation by the agency or its legitimate successor
- **As evidence of the organization, functions, policies, decisions, procedures, operations or other activities of the government, or because of the informational and historical value of data contained in the record**, and includes records that are made confidential by statute.

WHAT IS NOT A RECORD

41-151.18. Definition of records - continued

Not included within the definition of records as used in this article:

- **Library or museum material** made or acquired solely for reference or exhibition purposes,
- **extra copies of documents preserved only for convenience of reference**
- **and stocks of publications or documents intended for sale or distribution to interested persons**

TITLE 39 – ARIZONA'S PUBLIC RECORDS LAW

Chapter 1 PUBLIC RECORDS

- **39-121** Inspection of public records
- **39-121.01** Definitions; maintenance of records; copies, printouts or photographs of public records; examination by mail; index
- **39-121.02** Action on denial of access; costs and attorney fees; damages
- **39-121.03** Request for copies, printouts or photographs; statement of purpose; commercial purpose as abuse of public record; determination by governor; civil penalty; definition
- **39-122** Free searches for and copies of public records to be used in claims against United States; liability for noncompliance
- **39-123** Information identifying eligible persons; confidentiality; definitions
- **39-124** Releasing information identifying an eligible person; violations; classification; definitions
- **39-125** Information relating to location of archaeological discoveries and places or objects included or eligible for inclusion on the Arizona register of historic places; confidentiality
- **39-126** Federal risk assessments of infrastructure; confidentiality
- **39-127** Free copies of police reports and transcripts for crime victims; definitions
- **39-128** Disciplinary records of public officers and employees; disclosure; exceptions

RECORDS OPEN TO INSPECTION

39-121. Inspection of public records

- **Public records** and other matters in the custody of any officer shall be open to inspection
- **by any person**
- at all times during office hours.

BASIC DEFINITIONS

39-121.01. Definitions; maintenance of records; copies, printouts or photographs of public records; examination by mail; index

- A. In this article, unless the context otherwise requires:
 - 1. "**Officer**" means **any person elected or appointed** to hold any elective or appointive office of any public body and any chief administrative officer, head, director, superintendent or chairman of any public body.
 - 2. "**Public body**" means this state, any county, city, town, school district, political subdivision or tax-supported district in this state, any branch, department, board, bureau, commission, council or committee of the foregoing,
 - and any public organization or agency, supported in whole or in part by monies from this state or any political subdivision of this state, or expending monies provided by this state or any political subdivision of this state.

MAINTAINING AND PRESERVING RECORDS

39-121.01. Definitions; maintenance of records; copies, printouts or photographs of public records; examination by mail; index

- B. All officers and public bodies **shall maintain all records reasonably necessary or appropriate** to
 - maintain an accurate knowledge of their official activities and
 - of any of their activities which are supported by monies from this state or any political subdivision of this state.
- C. Each public body **shall be responsible for the preservation, maintenance and care of that body's public records,**
- It shall be the duty of each such body **to carefully secure, protect and preserve public records from deterioration, mutilation, loss or destruction....**

RIGHT TO EXAMINE OR REQUEST RECORDS AND THE CHARGES TO DO SO (NON-COMMERCIAL)

39-121.01. Definitions; maintenance of records; copies, printouts or photographs of public records; examination by mail; index

- **Any person may request to examine or be furnished copies,** printouts or photographs of any public record
 - during regular office hours or
 - may request that the custodian mail a copy of any public record not otherwise available on the public body's website to the requesting person.
- The **custodian may require** any person requesting **to pay in advance for any copying and postage charges.**
- The custodian of such records **shall promptly furnish such copies,** printouts or photographs....

WHAT INFORMATION DOES THE PUBLIC HAVE TO PROVIDE FOR PUBLIC RECORDS REQUEST?

- Can a public body require the public use a specific form to make a public records request?
- Arizona law does not require that the requestor make a written request.

From the AZ Attorney General Handbook to State Agencies on Public Records:

- If the requestor refuses to make a written request and insists on making a verbal request, the absence of a written request cannot be the basis for denial.
- Unless otherwise provided by statute, a public records requestor is obligated to **provide a description of the item requested and whether it will be used for a commercial or noncommercial purpose**.
- A public body may ask the requestor for additional information (eg. name, phone number, email address, home address, or reason for the request).
- However, **if the requestor refuses to provide this information, it cannot be used as grounds to deny the request.**

INDEX OF RECORDS NOT PROVIDED

39-121.01. Definitions; maintenance of records; copies, printouts or photographs of public records; examination by mail; index

- If requested, the custodian of the records of an agency shall also **furnish an index of records or categories of records that have been withheld**
- **and the reasons the records or categories of records have been withheld** from the requesting person.
- The custodian shall **not include in the index** information that is expressly made privileged or confidential in statute or a court order.

CUSTODIAN OF RECORD NEEDS TO RETAIN CUSTODY OF THE RECORD

39-121.01. Definitions; maintenance of records; copies, printouts or photographs of public records; examination by mail; index

- 3. If the custodian of a public record **does not have facilities for making copies**, printouts or photographs of a public record which a person has a right to inspect,
- such **person shall be granted access to the public record for the purpose of making copies**, printouts or photographs.
- The copies, printouts or photographs **shall be made while the public record is in the possession, custody and control of the custodian of the public record** and shall be subject to the supervision of such custodian.
- E. **Access** to a public record **is deemed denied** if a custodian fails to promptly respond to a request for production of a public record or fails to provide to the requesting person an index of any record or categories of records that are withheld from production....

DENIED ACCESS TO RECORDS – RIGHT TO TAKE PUBLIC BODY TO COURT

39-121.02. Action on denial of access; costs and attorney fees; damages

- A. **Any person who has requested** to examine or copy public records **and who has been denied access** to or the right to copy such records,
- **may appeal the denial through a special action in the superior court,**
- B. The court **may award attorney fees and other legal costs that are reasonably incurred** in any action if the person seeking public records has substantially prevailed.
- Nothing in this subsection shall **limit the rights of any party to recover attorney fees, expenses and double damages**

WRITTEN COMMERCIAL REQUEST FOR RECORDS

39-121.03. Request for copies, printouts or photographs; statement of purpose; commercial purpose as abuse of public record; determination by governor; civil penalty; definition

- A. When a person requests copies, printouts or photographs of public records for a commercial purpose.
- the **person shall provide a statement setting forth the commercial purpose** for which the copies, printouts or photographs will be used.

Commercial Purpose: expectation of making money off of the information

- D. For the purposes of this section, "commercial purpose" means the use of a public record
- **for the purpose of sale or resale or**
- **for the purpose of** producing a document containing all or part of the copy, printout or photograph **for sale or**
- the obtaining of **names and addresses** from public records **for the purpose of solicitation or**
- the **sale of names and addresses** to another **for the purpose of solicitation or**
- for any purpose **in which the purchaser can reasonably anticipate the receipt of monetary gain** from the direct or indirect use of the public record.
- Commercial purpose does not mean the use of a public record as evidence or as research for evidence in an action in any judicial or quasi-judicial body.

CHARGING FOR COMMERCIAL REQUESTS

39-121.03. Request for copies, printouts or photographs; statement of purpose; commercial purpose as abuse of public record; determination by governor; civil penalty; definition

- Upon being furnished the statement the custodian of such records may furnish reproductions, **the charge for which shall include the following:**
- 1. **A portion of the cost to the public body for obtaining the original or copies** of the documents, printouts or photographs.
- 2. **A reasonable fee for the cost of time, materials, equipment and personnel in producing** such reproduction.
- 3. The **value of the reproduction on the commercial market** as best determined by the public body.
- B. If the custodian of a public record determines that the commercial purpose stated in the statement is a **misuse of public records** or is **an abuse of the right to receive public records**,
- the **custodian may apply to the governor** requesting that the governor by executive order prohibit the furnishing of copies, printouts or photographs for such commercial purpose....

WHAT'S THE HARM IN LYING?

39-121.03. Request for copies, printouts or photographs; statement of purpose; commercial purpose as abuse of public record; determination by governor; civil penalty; definition

- C. A person who obtains a public record for a commercial purpose **without indicating the commercial purpose** or
- who obtains a public record for a noncommercial purpose and uses or knowingly allows the use of such public record for a commercial purpose or
- uses or knowingly allows the use of such public record for a different commercial purpose or
- who obtains a public record **from anyone other than the custodian** of such records and **uses it for a commercial purpose** shall
- in addition to other penalties be liable to the state or the political subdivision from which the public record was obtained **for damages in the amount of three times the amount which would have been charged for the public record had the commercial purpose been stated plus costs and reasonable attorney fees** or
- shall be liable to the state or the political subdivision **for the amount of three times the actual damages** if it can be shown that the public record would not have been provided had the commercial purpose of actual use been stated at the time of obtaining the records.

FREE RECORDS FOR RECORDS TO BE PRESENTED TO THE FEDERAL GOVERNMENT

39-122. Free searches for and copies of public records to be used in claims against United States; liability for noncompliance

- A. No state, county or city, or any officer or board thereof shall demand or receive a fee or compensation,
- when they are to be used in connection with a claim for a pension, allotment, allowance, compensation, insurance or other benefits which is to be presented to the United States or a bureau or department thereof.
- C. on request of an official of the United States, a claimant, his guardian or attorney.

PROTECTED INFORMATION FOR "ELIGIBLE PERSONS"

39-123. Information identifying eligible persons; confidentiality; definitions

- A. Nothing in this chapter requires disclosure from a personnel file by a law enforcement agency or employing state or local governmental entity of the home address or home telephone number of eligible persons.
- B. The agency or governmental entity may release the information in subsection A of this section **only if either:**
 - 1. The **person consents in writing to the release.**
 - 2. The custodian of records of the agency or governmental entity **determines that release of the information** does not create a reasonable risk of physical injury to the person or the person's immediate family or damage to the property of the person or the person's immediate family.

LIST OF "ELIGIBLE PERSONS"

39-123. Information identifying eligible persons; confidentiality; definitions

4. **"Eligible person"** means a
- peace officer,
 - border patrol agent,
 - justice, judge, commissioner,
 - public defender,
 - prosecutor,
 - code enforcement officer,
 - adult or juvenile corrections officer,
 - corrections support staff member,
 - probation officer,
 - member of the board of executive clemency,
 - law enforcement support staff member,
 - national guard member who is acting in support of a law enforcement agency,
 - person who is protected under an order of protection or injunction against harassment,
 - firefighter who is assigned to the Arizona counterterrorism center in the department of public safety
 - or victim of domestic violence or stalking who is protected under an order of protection or injunction against harassment.

GOVERNMENT EMPLOYEES AND "ELIGIBLE PERSONS"

39-124. Releasing information identifying an eligible person; violations; classification; definitions

- A. Any person who is employed by a state or local government entity and who
- **knowingly releases the home address or home telephone number** of an eligible person
- with the intent to hinder an investigation,
- cause physical injury to an eligible person or the eligible person's immediate family or
- cause damage to the property of an eligible person or the eligible person's immediate family
- **is guilty of a class 6 felony.**
- B. Any person who is employed by a state or local government entity
- **knowingly releases a photograph of a peace officer** (same conditions above)
- **is guilty of a class 6 felony.**

LOCATION OF ARCHAEOLOGICAL DISCOVERIES - PROTECTED

39-125. Information relating to location of archaeological discoveries and places or objects included or eligible for inclusion on the Arizona register of historic places; confidentiality

- Nothing in this chapter requires the disclosure of public **that relate to the location of archaeological discoveries...**
- **or places or objects that are included on or may qualify for inclusion on the Arizona register of historic places....**
- if the officer determines that the release of the information creates **a reasonable risk of vandalism, theft or other damage** to the archaeological discoveries or the places or objects that are included on or may qualify for inclusion on the register.
- officer may consult with the director of the Arizona state museum or the state historic preservation officer.

FEDERAL RISK ASSESSMENTS - PROTECTED

39-126. Federal risk assessments of infrastructure; confidentiality

- Nothing in this chapter requires the disclosure of a risk assessment that is performed by or on behalf of a federal agency to evaluate critical energy, water or telecommunications infrastructure to determine its vulnerability to sabotage or attack.

FREE POLICE REPORTS FOR VICTIMS

39-127. Free copies of police reports and transcripts for crime victims; definitions

- **A. A victim of a criminal offense or an immediate family member of the victim if the victim is killed or incapacitated**
- has the right to receive one copy of the police report from the investigating law enforcement agency at no charge and, on request of the victim,
- the court or the clerk of the court shall provide, at no charge, the minute entry or portion of the record of any proceeding in the case
- that is reasonably necessary for the purpose of pursuing a claimed victim's right.

DISCIPLINARY ACTION - OPEN

39-128. Disciplinary records of public officers and employees; disclosure; exceptions

- A. A public body shall maintain all records that are reasonably necessary or appropriate to maintain an accurate knowledge of **disciplinary actions**, including the employee responses to all disciplinary actions, involving **public officers or employees of the public body**.
- The records **shall be open to inspection and copying** pursuant to this article, unless inspection or disclosure of the records or information in the records is contrary to law.
- B. This section does not:
 - 1. **Require disclosure of the home address, home telephone number or photograph** of any person who is an “eligible person”.
 - 2. Limit the duty of a public body or officer to **make public records open to inspection and copying** pursuant to this article.

GENERAL PRINCIPLES FOR PUBLIC RECORDS REQUESTS

- The following slides are not specifically related to Title 39, but are general principles that apply to Public Records Requests.
- The first two relate to Denying Public Records Requests
- The next two slides relate to Confidential Records and Redaction of records
- The next couple of slides related to case law and Public Records Requests

3 REASONS TO DENY ACCESS

- **#1. Statutorily confidential or privileged**
 - Family Educational Rights and Privacy Act (FERPA)
 - Health Insurance Portability and Accountability Act (HIPAA)
- **#2. Records sealed by Court Order**
 - Always comply with Court Orders
- **#3. Correspondence with Attorney**
 - Protected by Attorney-Client privilege

DENYING ACCESS CONTINUED

- **Two Balancing Tests Applied on Case by Case Basis:**
- **Right to privacy**
 - Disclosure would invade privacy and that interest outweighs the public's right to know
- **Best interests of the State**
 - Seriously impair performance of duties

CONFIDENTIAL RECORDS - CLOSED

- **6.4.1 Records Confidential by Statute.**
- There are **over 300 Arizona statutes that address the confidentiality of records.**
- A comprehensive list of the Arizona statutes that may require that all or a portion of governmental records be protected from public disclosure is included at the end of this chapter. Appendix 6.1.
- <https://www.azag.gov/sites/default/files/sites/all/docs/agency-handbook/ch06.pdf>
- **Appendix 6.1 Records Made Confidential/Non-Disclosable by Arizona Statute (In Order by Title/Statute)**
 - Arizona rules may also limit disclosure of certain information.
 - In addition, federal law may require confidential treatment of certain information. See, e.g., 42 U.S.C. § 405(c)(2)(c)(ii), (viii)(I) (**prohibiting disclosure of social security numbers** to unauthorized persons).
- Public officials and employees should review the confidentiality provisions that affect their areas of responsibility to avoid disclosure of confidential information.

REDACTION OF RECORDS

- **6.5.1 Duty to Redact.**
- When confidential and public information are commingled in a single document, a copy of the document may be made available for public inspection **with the confidential material excised.**
- If confidential material has been attached to an otherwise disclosable document, **the material so attached may simply be removed.**

LAKE V. CITY OF PHOENIX, 2009

On October 29, 2009, in *Lake v. City of Phoenix* (CV-09-0036-PR), the Arizona Supreme Court held that “when a public entity maintains a public record in an electronic format, the electronic version of the record, **including any embedded metadata** is subject to disclosure under Arizona’s public records law.”

- There are **four (4) important effects** from the *Lake* decision [*David Lake v. City of Phoenix*, 222 Ariz. 547, 218 P.3d 1004 (2009)]
- Metadata is a public record. If records are retained in an electronic format, and the public requests those records, then the public has a right to receive those records in the electronic format, including all metadata associated with the records being requested.
- Police reports stored in a municipality's records management system that are linked to restricted databases of State and National criminal justice agencies are subject to disclosure as public records.
- Just because an employee leaves the public body does not remove the Records Management and public records requirements for email records of that former employee. Responsive e-mails of a former city employee in the possession of the city at the time of the request were subject to disclosure as public records.
- Working Documents are records. Unfinished police reports are subject to disclosure as public records absent any argument that the records should have been protected from production because of concerns regarding confidentiality, privacy, or the best interests of the state.

“ON-GOING REQUESTS”

- Court of Appeals held that A.R.S. § 39-121.01(D)(1) **does not require submission of separate requests for successive records**
- when records are:
 - Clearly articulated (**easily defined**)
 - **Part of defined category** (identifiable category)
 - Created over time (**regularly generated**)
 - Example: press releases, Minutes

COMMON PITFALLS OF PUBLIC RECORDS REQUESTS

10. Not knowing what is a public record
9. Failure to have, update, or follow record management system
8. Inappropriately handling requests
7. Failing to promptly furnish public records
6. Not knowing the exceptions
5. Making promises you cannot keep
4. Failure to recognize e-mail issues
3. Charging unauthorized fees
2. Not understanding commercial purpose
1. Records dump



PUBLIC RECORDS LAWS - DETAILED



GOT QUESTIONS?



Any Questions?

HELPFUL CONTACTS

Records Management Center (LAPR):
<http://www.azlibrary.gov/records/>
 Phone: 602-926-3815
records@azlibrary.gov

****State Ombudsman's Office**
<http://www.azleg.gov/ombudsman/default.asp>

****State Attorney General – Public Records Publication**
<https://www.azag.gov/sites/default/files/sites/all/docs/agency-handbook/ch06.pdf>

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AIIM – Global Community of Information Professionals
<http://www.aiim.org/>

ARMA International:
<http://www.arma.org/>

Institute of Certified Records Managers (ICRM):
<http://www.icrm.org/>

National Archives and Records Management (NARA):
<http://www.archives.gov/records-mgmt/>

National Association of Government Archivists and Records Administrators (NAGARA):
<http://www.nagara.org/index.cfm>